Supreme Court, U.S.
FILED
SEP 25 1998
OFFICE OF THE CLERK

No. 98-334

In The

Supreme Court of the United States

October Term, 1997

MARIS FREED (f/k/a "MARIS FRIEDLANDER"),

Petitioner,

vs.

AMERICAN ARBITRATION ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BURTON G. FRIEDLANDER

WILLIAM R. KUTNER
Counsel of Record
Attorney for Respondent
Burton G. Friedlander
4 Martine Avenue
Suite 1114
White Plains, NY 10606
(914) 946-4700

Of Counsel:
MARK A. YOHANNA
JEFFREY W. DEER

148771

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

27 pp

RESPONDENT BURTON G. FRIEDLANDER'S RESTATEMENT OF QUESTIONS PRESENTED

1. Did the United States District Court for the Northern District of Illinois err when it dismissed this civil action for want of subject matter jurisdiction?

2. Did the United States Court of Appeals for the Seventh Circuit err when it affirmed the Judgment of the District Court?

3. Did the United States Court of Appeals for the Seventh Circuit err or abuse its discretion when it denied Petitioner's motion for an order enjoining and restraining the American Arbitration Association from proceeding with the arbitration at White Plains, New York?

4. Did the United States Court of Appeals for the Seventh Circuit err when it denied Petitioner's motion for a rehearing?

TABLE OF CONTENTS

Page

Respondent Burton G. Friedlander's Restatement of Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Statement of Jurisdiction 1

Statement of the Case 1

A. Factual Summary 1

B. Procedural History 5

Reasons for Denying the Writ 7

I. Petitioner Has Failed To Invoke This Court's Appellate Jurisdiction In A Timely Manner. .. 7

II. To The Extent That Petitioner Complains Of A Deprivation Of Liberty Or Property Without Due Process Of Law, Such Alleged Deprivation Was At The Hands Of The AAA, A Private, Non-Governmental Entity Selected By Petitioner Herself As The Arbiter Of All Potential Future Disputes Between The Parties. 10

Contents

Page

III. To The Extent That Petitioner Complains Of The Commission Of One Or More Alleged Torts Against Her By The AAA, And/Or One Or More Breaches Of Contract By The AAA, This Court Lacks Subject Matter Jurisdiction Because Petitioner Has Not Alleged, And Cannot Demonstrate, That The Requisite Amount Is In Controversy. 11

IV. Even If The District Court Had Subject Matter Jurisdiction To Determine The Merits Of This Controversy, It Properly Declined To Interfere With The AAA's Interlocutory Determination On The Issue Of Locale. 12

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Aerojet-General Corp. v. American Arbitration Association, 478 F.2d 248 (9th Cir. 1973) 15, 16

D.M.C. Construction Corp. v. A. Leo Nash Steel Corp., 51 A.D.2d 1040, 381 N.Y.S. 2d 325 (2d Dept. 1976) (mem.),*aff'd*, 41 N.Y. 2d 855, 393 N.Y.S. 2d 709, 362 N.E. 2d 260 (1977) 13, 14, 16

Federal Election Commission v. NRA Political Victory Fund, 513 U.S. 88, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994) 9

Michaels v. Mariforum Shipping, S.A., 624 F.2d 411 (2d Cir. 1980) 16

Missouri v. Jenkins, 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990) 8

Royal Globe Ins. Co. v. Spain, 36 A.D. 2d 632, 319 N.Y.S. 2d 115 (2d Dept. 1971) (mem.) 12, 13

Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc., 878 F.2d 5 (1st Cir. 1989) ... 16

S.J. Groves & Sons Co. v. American Arbitration Association, 452 F. Supp. 121 (D. Minn. 1978) ... 11

State Farm Ins. Co. v. McManus, __ A.D. 2d __, 670 N.Y.S. 2d 599 (2d Dept. 1998) (mem.) 15

Stevens v. Coudert Bros., 242 A.D. 2d 454, 662 N.Y.S. 2d 42 (1st Dept. 1997) (mem.) 14

TABLE OF CITED AUTHORITIES (CONTINUED)

Page

Constitutional Provisions:

Art. III, § 1 7

Art. III, § 2 7

Amendment XIV, § 1 10

Statutes:

Federal Arbitration Act 16

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 10

28 U.S.C. § 1332(a) 11

28 U.S.C. § 2101(c) 1, 8

28 U.S.C. § 2108 12

N.Y. CPLR Article 75 12

N.Y. CPLR 7510 16

N.Y. CPLR 7511 16

TABLE OF CITED AUTHORITIES (CONTINUED)

Page

Rules:

Rules of the Supreme Court of the United States:

Rule 10 16

Rule 12.3 ..... 7, 8

Rule 13.2 1

Rule 13.3 ..... 1, 6, 8

Rule 14.5 ..... 6, 8

Rule 29.2 6

Rule 29.3 ..... 1, 7, 8

Rule 30.1 6

Federal Rules of Appellate Procedure:

Rule 40(a) 6

Federal Rules of Civil Procedure:

Rule 24(a) 5

Rule 24(b) 5

APPENDIX

Page

Appendix A — Affidavit of Mark A. Yohanna, Sworn to on September 23, 1998 ..... 1a

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1254(1). As is set forth in Point I of Respondent's Argument, *infra,* Petitioner fails to do so properly because she did not serve her papers upon Respondent BURTON G. FRIEDLANDER within the time limited therefor by a controlling statute (28 U.S.C. § 2101[c]) and applicable Rules of this Court (Rules 13.2, 13.3, and 29.3). This Court should therefore decline to consider any of the questions raised in the Petition for lack of jurisdiction.

STATEMENT OF THE CASE

The controversy underlying this Petition arises from the 1978-79 dissolution of the marriage of Petitioner, MARIS FREED (who was formerly known as "MARIS FRIEDLANDER"), to Respondent BURTON G. FRIEDLANDER. Twenty years ago the parties agreed to arbitrate all disputes that might arise between them in the future. In December of 1996, however, Petitioner attempted, without success, to avoid her agreement to arbitrate. Having failed to do so, she commenced this civil action to compel the arbitral forum to change the "locale" (or "venue") of such an arbitration from White Plains, New York to Chicago, Illinois, which she prefers.

A. Factual Summary

More than 20 years ago, on August 30, 1978, Petitioner commenced an action against Respondent BURTON G. FRIEDLANDER in the Supreme Court of the State of New York, County of Westchester, for a divorce and ancillary relief (the "Matrimonial Action"). Just 10 weeks later, on or about November 15, 1978, represented by separate New York law

firms, Petitioner and Respondent BURTON G. FRIEDLANDER entered into a written agreement (the "Stipulation") in which they agreed, among other things, as follows:

> (1) This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York. (Art. VII, par. 3)
>
> (2) In the event any dispute over the construction or application of this Agreement cannot be resolved between the parties, the sole remedy other than that of confirming and enforcing an award shall be that of arbitration under the then current rules of the American Arbitration Association. . . . (Art. XV)

In early 1979, Petitioner moved for a judgment of divorce based on the terms of the Stipulation. Respondent BURTON G. FRIEDLANDER did not oppose her application.

On April 10, 1979, a Justice of Supreme Court, Westchester County, made findings of fact and conclusions of law, and stated them in a paper entitled "FINDINGS AND JUDGMENT" (the "Judgment"). The Judgment was "entered" on April 13, 1979. All the terms of the Stipulation, including the choice-of-law provision quoted above and the arbitration provision quoted in part above, were judicially-approved and expressly incorporated by reference in the Judgment. As further agreed by the parties (in Art. IV), the Stipulation did not "merge[ ]" in the Judgment and was deemed to "survive" the entry of the Judgment.

From April 13, 1979 until December 18, 1996 — a period of more than 17 years — there was no arbitration, no litigation, and no proceeding of any other type to resolve any dispute between the parties.

On December 19, 1996, more than 18 years after Petitioner and Respondent chose to be bound by New York law, and to submit all possible future disputes concerning the terms of the Stipulation to binding arbitration, Petitioner initiated a litigation against Respondent BURTON G. FRIEDLANDER in the Circuit Court of Cook County, Illinois (the "Illinois Court"). Petitioner alleged therein (1) that Respondent BURTON G. FRIEDLANDER owes substantial sums of money to her pursuant to the terms of the Stipulation and the Judgment; and (2) that he also has one or more additional liabilities to her.

On November 5, 1997, the Illinois Court made an Order staying further prosecution of Petitioner's action against Respondent and directing Petitioner to proceed to arbitration before the American Arbitration Association (the "AAA"), as agreed by the parties in Article XV of the Stipulation.

On November 13, 1997, Respondent BURTON G. FRIEDLANDER initiated an arbitration proceeding against Petitioner before the AAA at White Plains, New York. Rule 11 of the AAA's Commercial Arbitration Rules, entitled "Fixing of Locale," provides as follows:

> The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within ten days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

A formal notice of the initiation of the arbitration was actually received by Petitioner on November 19, 1997. Pursuant to Rule 11, Petitioner had 10 days to object to the White Plains, New York "locale" selected by Respondent BURTON G. FRIEDLANDER. She failed to make any objection to such locale within that time frame and thereby waived any objection she might otherwise have made to such locale.

Rule 39 of the AAA's Commercial Arbitration Rules, entitled "Extensions of Time," provides in relevant part that "The AAA . . . may for good cause extend any period of time established by these rules, except the time for making the award." On December 8, 1997, notwithstanding Petitioner's violation of Rule 11 of the AAA's Commercial Arbitration Rules, and her resulting waiver of any right she might otherwise have had to object to the White Plains, New York locale, the AAA informed Petitioner that it would permit her to state objections to the White Plains, New York locale "within ten (10) days from the date of this letter" (Pet. App. at 20[o] to 20[p]). Notwithstanding that generous extension of time, Petitioner failed to state such objections by the extended deadline.

On December 27, 1997, Petitioner served a lengthy set of papers in which she (1) objected to the White Plains, New York locale for the arbitration; and (2) interposed a counterclaim against Respondent BURTON G. FRIEDLANDER. Petitioner's counterclaim before the AAA comprised all alleged causes of action that were previously embraced in the litigation in the Illinois Court. Respondent BURTON G. FRIEDLANDER maintains, *inter alia*, that when Petitioner interposed such counterclaim, she voluntarily made the White Plains, New York arbitral forum *her* forum.

Notwithstanding Petitioner's failure to state objections to White Plains, New York as a proper locale for arbitration in a

timely manner, the AAA entertained her belated submission of objections thereto. On January 21, 1998, after considering the parties' respective contentions, including Petitioner's tardy objections, the AAA determined White Plains, New York to be the proper locale (Pet. App. at 20[t]).

Thereafter, Petitioner prosecuted an "appeal" to the AAA from its original determination on the question of locale. In effect, Petitioner asked the AAA to reconsider its original determination on the issue of locale.

On February 5, 1998, the AAA adhered to its original determination that White Plains, New York was the appropriate locale for the arbitration (Pet. App. at 20[u]).

B. Procedural History

On or about February 3, 1998, Petitioner commenced this action against the AAA and moved for preliminary injunctive relief. On February 12, 1998, Respondent BURTON G. FRIEDLANDER moved for leave to intervene (as a Defendant).

On February 12, 1998, the District Court (1) permitted Respondent BURTON G. FRIEDLANDER to intervene (Fed. R. Civ. P. 24[a] and/or [b]); (2) denied Petitioner's motion for an order enjoining and restraining the AAA from proceeding with the arbitration at White Plains, New York; and (3) granted oral motions made on behalf of the AAA and Respondent BURTON G. FRIEDLANDER, and summarily dismissed this civil action for lack of subject matter jurisdiction (Pet. App. at 20[b]).

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, and moved in that Court for injunctive relief. On March 2, 1998, the Court of Appeals (1) denied her

motion for equitable relief; (2) dispensed with formal briefing and oral argument; and (3) summarily affirmed the District Court's dismissal of this civil action (Pet. App. at 20[e] and 20[g]).[1]

Petitioner moved in the Court of Appeals for "reconsideration."[2] On March 23, 1998, the Seventh Circuit denied her application (Pet. App. at 20[f]).[3]

On Friday, June 19, 1998, Petitioner mailed her original Petition for a Writ of Certiorari to this Court. On Monday, June 22, 1998 — the very last day for filing — the Clerk of this Court received those papers. On June 26, 1998, the Clerk rejected those papers and returned them to Petitioner's attorney under cover of a letter setting forth multiple instances of non-compliance with this Court's Rules. The Clerk's letter of transmittal advised Petitioner's Counsel of Record that corrected papers would be deemed timely only if actually *received* by the Court within 60 days from the date of such letter. The Clerk's letter cited Rule 14.5 (concerning receipt of papers), and cautioned Petitioner that Rule 29.2 (concerning mailing of papers) would not apply.

---

1. The Seventh Circuit's March 2, 1998 order affirming the judgment of the District Court is set forth on pages 20(e) and 20(g) of Petitioner's Appendix. The material on page 20(f) thereof pertains to Petitioner's request for a rehearing. See n.2, *infra*.

2. The Seventh Circuit's March 13, 1998 order denying Petitioner's motion for "reconsideration" is set forth on page 20(f) of Petitioner's Appendix. The proper nomenclature is "rehearing" (Rule 13.3 and Fed. R. App. P. 40).

3. Sunday, June 21, 1998, was the 90th day after the date of the Seventh Circuit's March 23, 1998, order denying Petitioner's motion for a rehearing. Accordingly, Petitioner's time to file a Petition for a Writ of Certiorari was extended to and including Monday, June 22, 1998 (Rule 30.1).

August 25, 1998 was the 60th day after the date of the Clerk's letter of June 26, 1998. On that date, at 11:30 p.m., the Court's Police Department "clocked in" Petitioner's revised papers. The alleged proof of service tendered to this Court along with such revised papers (pursuant to Rule 12.3) admitted that service of papers had *not* been effected "at or before the time of filing," as is required by Rule 29.3. In effect, such submission amounted to no more than a promise that such necessary service would be effected *in futuro*.[4]

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO INVOKE THIS COURT'S APPELLATE JURISDICTION IN A TIMELY MANNER.

The Constitution provides that the judicial power of the United States extends to certain enumerated Cases and Controversies (Art. III, §§ 1, 2); that this Court shall have original jurisdiction as to some of those Cases and Controversies; and that as to all the remaining Cases and Controversies, it "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make" (Art. III, § 2).

---

4. Petitioner's undated "Proof of Service" was issued by Petitioner's Counsel of Record, EDWARD KAPLAN, ESQ., no later than August 25, 1998, as it was "clocked in" by the Court's Police Department on that date (at 11:30 p.m.). Although written unartfully in the past tense ("we served"), it alleges service *in futuro* (i.e., on August 26, 1998). In fact, such service was not made until two days later, on August 27, 1998; was made by mail; and was not received by Respondent BURTON G. FRIEDLANDER's counsel until August 28, 1998 (*see* Affidavit of MARK A. YOHANNA, ESQ., sworn to on September 23, 1998, lodged with this Court on this date).

Congress has exercised its power to control the Court's appellate jurisdiction. For example, it has directed that a petition for a writ of certiorari in a civil case must be filed within 90 days from the entry of the judgment below (28 U.S.C. § 2101[c]). This Court has held that such 90-day limit is mandatory and jurisdictional. *E.g., Missouri v. Jenkins,* 495 U.S. 33, 45, 110 S. Ct. 1651, 1660, 109 L. Ed. 2d 31, __ (1990).

This Court has directed that where a timely petition for a rehearing is filed in the court below, the 90-day deadline for filing a petition for a writ of certiorari shall be deemed to begin to run when the motion for a rehearing is denied (Rule 13.3). Respondent BURTON G. FRIEDLANDER does *not* raise any objection to the Petition based on Petitioner's application for "reconsideration" in the Court of Appeals.

Monday, June 22, 1998 would have been the last day for Petitioner to serve and file her Petition for a Writ of Certiorari, but this Court has delegated to the Clerk authority to extend that deadline for not more than 60 days where, as here, the Petition is submitted in good faith but is defective in form. *Cf.* 28 U.S.C. § 2101(c) (last sentence) and Rule 14.5.

In order to be *authorized* to file a petition for a writ of certiorari, a petitioner must submit proof of compliance with Rule 29.3 (*see* Rule 12.3). This amounts to proof that three copies of the petition were served upon each respondent *at or before* the time when the petition was tendered to the Clerk for filing.

This Court need not determine on this record whether the fact that service occurred after filing constitutes a jurisdictional defect. Perhaps a case will someday be presented to this Court in which the time to serve and file papers has not expired, and in which the papers will be filed first and served later. That is

not this case. Here, however, the time to seek review by way of a writ of certiorari expired *before* service of process occurred, and service was a prerequisite for such filing.

Where, as here, a petition for certiorari is tendered to the Clerk for filing in a timely manner, and the papers are accepted by the Clerk, but a petitioner was not authorized to file those papers with the Clerk because a mandatory condition precedent was not satisfied, the petition should be dismissed.

In *Federal Election Commission v. NRA Political Victory Fund,* 513 U.S. 88, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994), the petition for a writ of certiorari was filed in a timely manner, but the petitioner was not authorized to file the petition. Later on, after the deadline for filing had passed, the Solicitor General attempted to authorize the petition retroactively with *nunc pro tunc* effect. This Court rejected that effort.

This Court should distinguish cases in which the manner of service was challenged and cases in which the form of proof of service was challenged. Here, service of the papers — which was a prerequisite to the filing of the papers — did not take place until *after* the statutory deadline. Congress has exercised its constitutional authority to regulate this Court's appellate jurisdiction, and has expressly deprived this Court of any discretion to overlook Petitioner's default.

II.

TO THE EXTENT THAT PETITIONER COMPLAINS OF A DEPRIVATION OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, SUCH ALLEGED DEPRIVATION WAS AT THE HANDS OF THE AAA, A PRIVATE, NON-GOVERNMENTAL ENTITY SELECTED BY PETITIONER HERSELF AS THE ARBITER OF ALL POTENTIAL FUTURE DISPUTES BETWEEN THE PARTIES.

Assuming *arguendo* that Petitioner's application has been presented to this Court in a timely manner, to the extent that Petitioner alleges one or more violations of her rights under the Due Process Clause of the Fourteenth Amendment, she attempts to invoke federal question jurisdiction (28 U.S.C. § 1331).

The Due Process Clause of the Fourteenth Amendment provides that no *State* shall deprive any person of life, liberty, or property without due process of law. The Due Process Clause does not reach the conduct of private, non-governmental entities such as the AAA. On this issue, Respondent BURTON G. FRIEDLANDER respectfully defers to the arguments advanced to this Court on behalf of the AAA by its counsel.

III.

TO THE EXTENT THAT PETITIONER COMPLAINS OF THE COMMISSION OF ONE OR MORE ALLEGED TORTS AGAINST HER BY THE AAA, AND/OR ONE OR MORE BREACHES OF CONTRACT BY THE AAA, THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PETITIONER HAS NOT ALLEGED, AND CANNOT DEMONSTRATE, THAT THE REQUISITE AMOUNT IS IN CONTROVERSY.

Assuming *arguendo* that Petitioner's application has been presented to this Court in a timely manner, to the extent that it alleges a tort of "outrage" (also known as "intentional infliction of severe emotional distress"), and/or one or more breaches of contract by the AAA, she attempts to invoke diversity-of-citizenship jurisdiction (28 U.S.C. § 1332[a]).

Although Respondent BURTON G. FRIEDLANDER concedes that diversity of citizenship exists, he does *not* concede that diversity-of-citizenship jurisdiction exists. Such jurisdiction is limited to those cases in which "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. . . ." (28 U.S.C. § 1332[a]).

This Court should find that the amount in dispute between Petitioner and Respondent BURTON G. FRIEDLANDER is smaller than the minimum jurisdictional amount. For this purpose the proper measure of the injury to Petitioner, if any, is the increased expense she will incur, if any, to present her case in the designated locale (White Plains, New York) as opposed to her preferred locale (Chicago, Illinois). *S.J. Groves & Sons Co. v. American Arbitration Association,* 452 F. Supp. 121 (D. Minn. 1978). It is a virtual certainty that Petitioner will not incur at least $75,000 in additional expenses to present

her case at White Plains, New York as opposed to Chicago, Illinois. Nothing in this record supports any other conclusion, and the Court of Appeals perceived no need to entertain additional proofs (28 U.S.C. § 2108).

IV.

EVEN IF THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO DETERMINE THE MERITS OF THIS CONTROVERSY, IT PROPERLY DECLINED TO INTERFERE WITH THE AAA'S INTERLOCUTORY DETERMINATION ON THE ISSUE OF LOCALE.

Bearing in mind that the parties agreed in the Stipulation to be bound by New York law and that Supreme Court, Westchester County, approved their agreement, the District Court and the Court of Appeals correctly declined to overturn the AAA's determination of the preliminary issue of locale.

Under well-established New York law, courts generally may not entertain interlocutory challenges to rulings of arbitrators concerning the locale for arbitration hearings.

In *Royal Globe Ins. Co. v. Spain,* 36 A.D. 2d 632, 319 N.Y.S. 2d 115 (2d Dept. 1971) (mem.), arbitrators determined New York to be the proper locale for an arbitration. Dissatisfied with that determination, one of the parties commenced a special proceeding under CPLR Article 75 to stay the arbitration. The trial court granted that petition to the extent of directing the arbitration to proceed in Connecticut, rather than in New York as determined by the arbitrators. The Appellate Division reversed, dismissed the petition to stay the arbitration, and held that the contract between the parties authorized the arbitrators

to determine locale. Significantly, the AAA was the arbitration forum in *Royal Globe,* and the rules that governed there were the same as the rules that govern here.

Five years later, in *D.M.C. Construction Corp. v. A. Leo Nash Steel Corp.,* 51 A.D.2d 1040, 381 N.Y.S. 2d 325 (2d Dept. 1976) (mem.), Supreme Court, Kings County, reviewed and revised the AAA's determination that Buffalo, New York should be the locale for the arbitration. On appeal, a divided panel of the Appellate Division affirmed that order by a vote of 3-2. A majority of the panel issued a one-sentence memorandum explaining its reasoning:

> We find ample ground for Special Term's appropriate exercise of its discretion to have the arbitration proceeding conducted in the city in which the records are located and to avoid unnecessary hardship and needless expense to parties, witnesses, etc.

51 A.D. 2d at 1040, 381 N.Y.S. 2d at 325.

The dissenters joined in a lengthy analysis of the issue and reasoned as follows:

> Bearing in mind that the purpose of arbitration is to keep the parties out of court litigation, it would be an unseemly application of arbitration law to hold that a court may review the exercise of discretion by arbitrators as to the site of an arbitration hearing even though the parties agreed that if a dispute should arise between them as to such site, that the determination of that issue would be for the arbitrators and that their determination would be final and binding. Such a holding would fly in the

> face of the very purposes of arbitration agreements, one of which is the summary disposition of disputes without involving the parties in court litigation.
>
> [I]n the absence of some indication of fraud or other cognizable dereliction, a court has no power to interfere with a determination by an arbitrator as to where the arbitration hearings are to be held when the parties have affirmatively agreed that the determination of the arbitrators in that regard shall be final and binding [citing *Royal Globe*].

51 A.D. 2d at 1042, 381 N.Y.S. 2d at 327. The dissenters opined that the record before them contained no proof of bad faith on the part of the AAA, and no proof that the parties were not accorded a fair hearing on their respective contentions as to venue. 51 A.D. 2d at 1043, 381 N.Y.S. 2d at 328.

Permission to appeal to the Court of Appeals was granted by the Appellate Division. Thereafter, New York's highest court *reversed* summarily and "on the dissenting opinion" at the Appellate Division. 41 N.Y. 2d 855, 393 N.Y.S. 2d 709, 362 N.E. 2d 260 (1977).

In *Stevens v. Coudert Bros.*, 242 A.D. 2d 454, 662 N.Y.S. 2d 42 (1st Dept. 1997) (mem.), the Appellate Division made the following observation:

> [C]ourts should proceed with "great caution" in interfering with the processes of the selected tribunal, particularly with respect to procedural threshold questions such as venue [citing *D.M.C.*].

Ultimately, the Court held that the reference of the dispute as to the locale for the arbitration to the AAA was proper.

In *State Farm Ins. Co. v. McManus*, __ A.D. 2d __, 670 N.Y.S. 2d 599 (2d Dept. 1998) (mem.), the trial court changed the locale of an arbitration, but the Appellate Division modified the order so as to reverse that determination:

> The Supreme Court erred in determining that the petitioner insurance carrier was entitled to change the venue of the arbitration hearing. Pursuant to the American Arbitration Association rules, the arbitrator is to select the location of the hearing, and the petitioner failed to demonstrate that the arbitrator violated any of the applicable rules in selecting the location. In addition, courts are generally without power to void the determination of an arbitrator in the selection of the venue of an arbitration proceeding [citing *D.M.C.*].

__ A.D.2d __, 670 N.Y.S. 2d 600.

These authorities demonstrate that New York law is clear. Our research has not unearthed any New York case in which a trial court vetoed the locale selected by an arbitrator and was affirmed on an appeal.

In *Aerojet-General Corp. v. American Arbitration Association*, 478 F.2d 248 (9th Cir. 1973), the court said the following:

> [A] ruling fixing the place for hearing may cause irreparable harm to one or more of the parties. As this court noted in Pacific Car & Foundry v. Pence, 403 F.2d 949 (9th Cir. 1968), error in denying a change of venue cannot effectively be remedied on appeal from the final judgment. Extreme cases can be imagined in which the choice of locale for

> arbitration is not made in good faith and severe irreparable injury is inflicted on one or more of the parties. In such case the courts should be free to prevent a manifest injustice. For this reason we decline to hold that immediate judicial review of a ruling setting the place for arbitration is never justified. [Citation omitted.] Only an extreme case could warrant such judicial review, and this is emphatically not such a case.

478 F.2d at 251.

It is significant that the dissenting opinion at the Appellate Division in *D.M.C.* — which was later adopted by the New York Court of Appeals — expressly acknowledged the opinion of the Ninth Circuit in *Aerojet*. 51 A.D. 2d at 1042-43, 381 N.Y.S. 2d at 328.

Aerojet was followed by the First Circuit in *Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc.*, 878 F.2d 5, 9 n.6 (1st Cir. 1989), a case governed by the Federal Arbitration Act. The Second Circuit has not yet ruled on this precise issue. *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 415 n.5 (2d Cir. 1980).

The disposition of this action by the District Court and the Court of Appeals is consistent with New York law. Further, New York law is in harmony with *Aerojet* and its limited progeny. There is, therefore, no good reason for this Court to grant the Petition (*see* Rule 10).

Petitioner will not be deprived of an appropriate remedy. When the arbitrators deliver an award, Petitioner may seek judicial confirmation (N.Y. CPLR 7510), or may seek vacatur or modification (N.Y. CPLR 7511). Until then, this is not a justiciable case or controversy.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

WILLIAM R. KUTNER
Counsel of Record
Attorney for Respondent
Burton G. Friedlander
4 Martine Avenue
Suite 1114
White Plains, NY 10606
(914) 946-4700

Of Counsel:
MARK A. YOHANNA
JEFFREY W. DEER

APPENDIX

APPENDIX A — AFFIDAVIT OF MARK A. YOHANNA, SWORN TO ON SEPTEMBER 23, 1998

(Omitted here but submitted separately as Lodging Appendix)